

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1874-CR

2010CF004642

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROHIT CHAND,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
CLARE L. FIORENZA, Judge. *Affirmed.*

Before Fine, Brennan and Kessler, JJ.

¶1 PER CURIAM. Rohit Chand appeals the order denying his petition for writ of *coram nobis* and the denial of his postconviction motion for plea withdrawal. Chand argues that he is entitled to withdraw his guilty plea because the circuit court did not state verbatim the immigration warning set forth in

WIS. STAT. § 971.08(1)(c) (2011-12).¹ Additionally, Chand argues that he is entitled to a writ of *coram nobis* as a result of factually erroneous information regarding the immigration ramifications of his guilty plea. The postconviction court concluded Chand was not entitled to plea withdrawal because the circuit court substantially complied with the immigration warning. In a separate order, the postconviction court denied Chand’s petition for writ of *coram nobis* explaining that Chand was really making an ineffective-assistance-of-counsel claim, which exceeded the scope of the writ. We agree with both conclusions and affirm.

BACKGROUND

¶2 In 2010, Chand entered a guilty plea to the felony charge of possession with intent to deliver 200 grams or less of THC. At the combined plea and sentencing hearing, the attorneys jointly recommended a withheld sentence—the prosecutor because of problems with the State’s case and defense counsel because of his client’s immigration status.

¶3 Confirming that Chand wanted a withheld sentence, Chand’s trial counsel explained:

I need that because of my client’s status.

He’s an Indian national.

He is a permanent resident.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The Honorable Clare L. Fiorenza issued orders denying Chand’s postconviction motion and his petition for writ of *coram nobis*. The Honorable Paul R. Van Grunsven presided over the plea proceedings, sentenced Chand, and entered the judgment of conviction.

He has a Green card.

He's been here since he was 10 years old.

But if you impose and stay, even if you impose and stay a sentence of a year or longer, he may be at risk for deportation.

¶4 The circuit court did not discuss Chand's immigration status in its sentencing remarks, but followed the parties' recommendation and withheld sentence "given the record now before this Court." The circuit court also allowed the defendant to petition for an expungement upon successful completion and discharge from probation.

¶5 Chand was discharged from probation in 2012.

¶6 On March 7, 2014, the Immigration and Customs Enforcement (ICE) division of the Department of Homeland Security (DHS) took Chand into custody and initiated removal proceedings. The Notice to Appear (NTA) that was issued alleged, among other things, that in 2010, Chand was convicted in the Milwaukee County Circuit Court of the offense of possession with intent to deliver THC. Based on this allegation, the NTA charges that Chand is subject to removal under 8 U.S.C. § 1227(a)(2)(B)(i) as an "alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, other than a single offense involving possession for one's own use of thirty grams or less of marijuana." (One parenthetical in original; one parenthetical omitted.)

¶7 Shortly after being taken into custody, Chand filed a postconviction motion for plea withdrawal. He argued that plea withdrawal was warranted based on the circuit court's failure to follow verbatim the text of WIS. STAT.

§ 971.08(1)(c) while conducting the plea colloquy. Additionally, Chand petitioned for writ of *coram nobis* to “remedy the error committed” when the circuit court relied on defense counsel’s representations regarding the immigration consequences of Chand’s plea and conviction. In a supporting affidavit, Chand asserts that contrary to his trial counsel’s representation to the court, he was never a permanent resident. Additionally, Chand averred that he would not have entered his plea if he had known that a withheld sentence would not prevent deportation.

¶8 The postconviction court first rejected Chand’s motion to vacate his conviction based on a violation of WIS. STAT. § 971.08 concluding that any linguistic deviations from the statute were immaterial and insufficient to warrant plea withdrawal. However, it ordered briefing on Chand’s petition for writ of *coram nobis*. After reviewing the record and the submissions, the postconviction court concluded that Chand’s claim did not fall within the scope of the writ. In its decision, the postconviction court explained:

In this instance, the defendant’s claim that his attorney misadvised him about the effect a withheld sentence would have on his immigration status does not allege an error of fact that was crucial to the judgment in this case. Rather, it is a claim of ineffective assistance of counsel which is not grounds for *coram nobis* relief. In essence, the defendant is attempting to utilize this writ to raise a *Padilla* [*v. Kentucky*, 559 U.S. 356 (2010),] claim, which the defendant is precluded from doing because the sentence of this case has expired.² No Wisconsin case has recognized the writ of error *coram nobis* as a viable remedy for a *Padilla* violation. The scope of a writ of error *coram nobis* is very limited and in this case, the defendant is not entitled to such relief.

² In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court held that an attorney performed deficiently by failing to inform a client that he may face deportation as a consequence of entering a guilty plea. *Id.* at 369.

(Footnote omitted.)

ANALYSIS

¶9 Chand presents two issues on appeal. He argues that he is entitled to withdraw his plea because the circuit court failed to properly advise him pursuant to WIS. STAT. § 971.08(1)(c). Additionally, he argues that he is entitled to a writ of *coram nobis*. We discuss each issue in turn.

I. Chand is not entitled to withdraw his plea because the circuit court substantially complied with the immigration warning of WIS. STAT. § 971.08(1)(c).

¶10 We independently consider whether the circuit court’s warning complied with WIS. STAT. § 971.08(1)(c). *See State v. Mursal*, 2013 WI App 125, ¶11, 351 Wis. 2d 180, 839 N.W.2d 173. Section 971.08(1)(c) provides, as relevant:

Before the court accepts a plea of guilty or no contest, it shall do all of the following:

....

Address the defendant personally and advise the defendant as follows: “If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.”

¶11 Here, the circuit court advised Chand as follows: “If you’re not a citizen of the United States, I am advising you that upon a plea of guilty or no contest to this charge, you could be deported, excluded from admission to this country or denied naturalization under federal law.” Chand acknowledged his understanding.

¶12 As in *Mursal*, “the [circuit] court’s warning given at the plea hearing complied completely with the statute’s substance, but its language deviated—very slightly—from the exact language expressed by the statute.” *Id.*, 351 Wis. 2d 180,

¶14. Notwithstanding the deviation, in *Mursal*, we held:

the statute’s purpose—to notify a non-citizen defendant of the immigration consequences of a criminal conviction—was undoubtedly effectuated, and the linguistic differences were so slight that they did not alter the meaning of the warning in any way; therefore, we conclude that the [circuit] court did in fact properly warn Mursal of the consequences of his plea pursuant to WIS. STAT. § 971.08(1)(c). Because the [circuit] court substantially complied with the mandate of § 971.08, Mursal is not entitled to withdraw his plea.

Mursal, 351 Wis. 2d 180, ¶20.

¶13 The same reasoning applies here. The postconviction court properly concluded that Chand is not entitled to withdraw his plea.³

II. *Chand is not entitled to a writ of coram nobis because it is based on claims of ineffective assistance of counsel.*

¶14 Additionally, Chand argues that the postconviction court erroneously exercised its discretion when it denied his petition for writ of *coram nobis* after concluding that his claim was outside the writ’s scope.

¶15 In *State ex rel. Patel v. State*, 2012 WI App 117, 344 Wis. 2d 405, 824 N.W.2d 862, we addressed the scope of the writ of *coram nobis* in Wisconsin:

³ To the extent Chand’s argument can be construed as an attempt to have us overrule or ignore *State v. Mursal*, 2013 WI App 125, 351 Wis. 2d 180, 839 N.W.2d 173, and require a verbatim reading of the statutory language of WIS. STAT. § 971.08(1)(c), we remind him that we have no authority to do so. See *Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (only the supreme court may overrule, modify, or withdraw language from a published court of appeals opinion).

The writ of *coram nobis* is a discretionary writ of “very limited scope” that is “addressed to the [circuit] court.” *Jessen v. State*, 95 Wis. 2d 207, 213, 290 N.W.2d 685 (1980). “The purpose of the writ is to give the [circuit] court an opportunity to correct its own record of an error of fact not appearing on the record and which error would not have been committed by the court if the matter had been brought to the attention of the [circuit] court.” *Id.* at 213-14, 290 N.W.2d 685; *see also Ernst v. State*, 179 Wis. 646, 652, 192 N.W. 65 (1923) (“[T]he principal aim of the writ of error *coram nobis* [is] to afford the court in which the action was tried an opportunity to correct its own record.”).

“A person seeking a writ of *coram nobis* must pass over two hurdles.” *State v. Heimermann*, 205 Wis. 2d 376, 384, 556 N.W.2d 756 (Ct. App. 1996). First, the individual must establish that no other remedy is available. *Id.* For example, a criminal defendant seeking the writ must not be in custody because in that case WIS. STAT. § 974.06 would provide a remedy. *See Heimermann*, 205 Wis. 2d at 376, 556 N.W.2d 756. “Second, the factual error that the petitioner wishes to correct must be crucial to the ultimate judgment and the factual finding to which the alleged factual error is directed must not have been previously visited or ‘passed on’ by the [circuit] court.” *Id.* In other words, “there must be shown the existence of an error of fact which was unknown at the time of [the plea] and which is of such a nature that knowledge of its existence at the time ... would have prevented the entry of judgment.” *See Jessen*, 95 Wis. 2d at 214, 290 N.W.2d 685.

Patel, 344 Wis. 2d 405, ¶¶12-13 (emphasis omitted).

¶16 The State concedes that Chand passes the first hurdle, but argues that he cannot pass the second because the error he relies on amounts to a claim of ineffective assistance of counsel, which is not a factual error but a legal one.

¶17 In an effort to escape the conclusion that his claim is one of ineffective assistance of counsel, Chand asserts:

Chand pleaded guilty for two reasons. First, because his trial attorney ... told him to plead guilty because doing so was the way to avoid an imposed but stayed sentence which sentence, according to [his trial

attorney], would have resulted in removal. Second, he pleaded guilty because [the circuit court] adopted the parties' recommendation as to disposition to avoid his removal.

The fact that Chand had two sources of assurances that his guilty plea would protect him from removal contradicts [the postconviction court]'s conclusion that Chand's is nothing but a *Padilla* claim.

¶18 We are not persuaded by Chand's attempt to convert this into something other than what it is: an ineffective-assistance-of-counsel claim.⁴ To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This is a legal issue. See *State v. Thiel*, 2003 WI 111, ¶23, 264 Wis. 2d 571, 665 N.W.2d 305 (“The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law.”) (brackets and citation omitted). As such, it is outside the scope of the writ.

⁴ Chand's averments in the affidavit he submitted in support of his postconviction motion include the following:

I believe that it is clear that my defense attorney was mistaken about several aspects of this case and its ultimate impact on me with Immigration. My defense attorney stated that I was a permanent resident alien, despite the fact that I never was. I had indicated that there was a process that was pending that might eventually result in permanent residence but it was not in a finished mode. Furthermore, it is clear that I was misadvised about the impact of this conviction on me, with my immigration status.

....

... When the judge followed the recommendation for being eligible to expunge upon completion of my probation, I felt positive and good that this would not harm me with Immigration, based upon what I had been led to understand from my attorney at that time.

¶19 Despite Chand’s efforts to distinguish it on its facts, *Patel*’s holding controls the outcome here. In that case, Patel sought a writ of *coram nobis*, urging this court to take an expansive view of the scope of the writ and apply it “to legal errors of fundamental and constitutional dimension, particularly when there are ‘serious collateral consequences.’” *Id.*, 344 Wis. 2d 405, ¶14 (citation omitted). We declined the invitation to take this expansive view and explained that doing so “would require us to inappropriately broaden the law.” *Id.*, ¶¶15, 18.

¶20 Following *Patel*, we agree with the postconviction court that Chand’s claim of ineffective assistance of counsel is outside the limited scope of a writ of *coram nobis*.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

